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317182—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 957

THE CREEK NATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 16–19) is not reported.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered November 12, 1940 (R. 19). A motion for new trial was denied February 3, 1941 (R. 19). The petition for a writ of certiorari was filed April 16, 1941. The juris-

diction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the Court of Claims erred in finding that the parties to the Creek Agreements of March 1, 1901, c. 676, 31 Stat. 861 and June 30, 1902, c. 1323, 32 Stat. 500, did not intend that the petitioner should retain title to the lands in the beds of the Arkansas, Cimarron, and Canadian rivers within the boundaries of the Creek Territory.

2. If the Court of Claims did err in so finding, whether the United States is obligated to compensate petitioner for those lands because Government officers drafted patents so as to pass title to the Creek allottees and purchasers.

STATUTE INVOLVED

The pertinent provision of the Act of March 1, 1901, c. 676, 31 Stat. 861, is set forth in the Argument (pp. 7–8, *infra*).

STATEMENT

Petitioner sought recovery in the Court of Claims for an alleged taking by the United States of the river beds of the Arkansas, Cimarron, and Canadian rivers within the Creek Territory in what is now the State of Oklahoma. The relevant

facts, as found by the Court of Claims (R. 13–15), may be summarized as follows:

On August 11, 1852, the United States conveyed to the Creek Indians a tract of land which included portions of the Arkansas, Canadian, and Cimarron rivers (R. 14). The tribe occupied this land until the allotment thereof to the individual tribal members, or the sales of lands not so allotted, under the Creek Agreements of March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32 Stat. 500 (R. 14). These allotments and sales were consummated by patents prepared by the United States and executed by the Chief of the Nation (R. 14). The patents described the lands "according to the United States survey thereof" (R. 10). The survey did not include the beds of the three rivers, meander lines being run along the banks (R. 14).

The river beds had no known value at the time the allotments were made (R. 14). Subsequently oil was discovered and the State of Oklahoma claimed title and granted oil leases, taking the position that the Arkansas and Cimarron rivers were navigable. Thereupon, the United States, on behalf of the Creek Nation, filed suit against the lessees to quiet the title of the Creek Nation (R. 14). The State of Oklahoma and many adjoining landowners intervened (R. 15). The State abandoned its claim after this Court held, in *Brewer Oil Co.* v. *United States,* 260 U. S. 77, that the

Arkansas River within the Creek country was not navigable (R. 15). The suit continued between the United States, on behalf of the Creek Nation, and the riparian landowners. The district court held that the river beds belonged to the riparian owners (R. 15). The Circuit Court of Appeals for the Eighth Circuit affirmed, holding "that it was the intention of all of the parties that the title of these riparian allottees conveyed by meander lines should extend to the thread of the stream and that no interest or title was reserved in or retained by the Creek Nation." *United States* v. *Hayes,* 20 F. 2d 873, 890 (C. C. A. 8th). Certiorari was denied, 275 U. S. 555.

On June 16, 1930, the petitioner brought the present suit in the Court of Claims pursuant to the Act of May 24, 1924, c. 181, 43 Stat. 139, as amended. The petition (R. 1–7) alleges that the parties to the Creek Agreements intended that petitioner should retain title to the lands in the river beds and that the United States is obligated to compensate petitioner for those lands because Government officers drafted patents so as to pass title to the Creek allottees and purchasers.

The Court of Claims denied recovery (R. 19) after making the following finding as to the intention of the parties (R. 15):

> At the time the allotments to the individual members of the tribe were made the question of whether or not the title of the riparian owner stopped at the low water

mark of the stream or extended to the thread of the stream was not discussed. It was, however, the purpose of all the parties that all of the lands in the Creek Nation, except those expressly reserved for certain named purposes, should be either allotted or sold, and that the Creek Nation should go out of existence and that the citizens thereof should become citizens of the United States. In making the allotments and selling the land adjoining these rivers, it was not the intention of the Creek Nation to reserve for itself the river beds of those streams.

ARGUMENT

1. Petitioner asserts (Pet. 9–16) that the parties to the Creek Agreements intended that petitioner should retain title to the river beds and contends (Pet. 18) that the United States is obligated to pay just compensation because its officers so drafted the patents that title passed to the Creek allottees and purchasers. The court below rejected the contention on the basis of its finding of fact that the parties did not intend that the river beds be retained by petitioner. The court said (R. 17) that it was "entirely satisfied with the discussion of this question" in *United States* v. *Hayes,* 20 F. 2d 873 (C. C. A. 8th), where precisely the same contention was made and rejected. This Court denied certiorari in the *Hayes* case, 275 U. S. 555.

The opinion in the *Hayes* case sets out in detail (20 F. 2d at 878, 887) the circumstances surrounding the Creek Agreements and summarizes them as follows (p. 889):

> Therefore, we have this situation: A long pursued purpose of Congress to allot *all* of these lands and distribute *all* tribal funds so that the tribal government and associations should speedily cease; full knowledge by the Indians of that purpose; formal agreement thereto; necessity of such allotment and distribution, both as benefits to the Indians and as a prerequisite step in accomplishing such tribal dissolution; a plan of allotment based on equality of value in land; such allotment to follow survey lines which meandered streams; stream bed lands of no then known value unless as appurtenant to riparian ownership; allotments and patents which have, as to all parties, fully executed these Agreements as to these riparian lands and vested rights in such allottees and purchasers.

The only reason now suggested for reexamining the decision reached in the *Hayes* case as to the intention of the parties to the Creek Agreements is new evidence contained in depositions of members of the Creek Tribe that the Indians understood that the allottees were to receive only 160 acres of land and that the river beds were to be retained by the Creek Nation.[1] Clearly these

[1] There is nothing in the record to show that the United States understood that title to the river beds was to remain

depositions (R. 20–49) do not establish that the court below erred in its finding as to the intention of the parties. The testimony was given by interested witnesses almost 30 years after the Creek Agreements and was elicited in response to leading questions. As the court below observed of similar evidence in another case, "Manifestly, this character of testimony is largely, if not entirely, without probative value." *Klamath Indian Tribes* v. *United States,* 86 C. Cls. 614, 630–631. And even if the testimony were to be accepted at its face value, it could not be said that the finding of the court below to the contrary was without substantial support.

It should be noted that the alleged understanding of the Indians that each allottee was to receive only 160 acres is contrary to the specific terms of Section 3 of the Creek Agreement of March 1, 1901, c. 676, 31 Stat. 861, which provides:

> One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for equalization of values, and any allottee receiv-

in the Tribe. The inter-departmental letter (R. 23–24) upon which petitioner relies simply contains a recital of a statement made in 1913 by a United States Attorney who had no part in the negotiations leading up to the Creek Agreements. Furthermore, the statement does not purport to show the Government's understanding of the Creek Agreements but expounds a legal theory which was rejected in the *Hayes* case, *supra*, p. 889.

> ing lands of less than such standard value may * * * select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

Clearly, therefore, the Creek Agreements contemplated an equality of value rather than of acreage. *United States* v. *Hayes, supra,* p. 889; cf. *United States* v. *Magnolia Petroleum Co.,* 110 F. (2d) 212, 219 (C. C. A. 10th). This being so, the inclusion of the river bed, which the court below found to have been of no known value at the time of the allotments (R. 14),[2] did not give the allottee more than the fair share contemplated by the statute.

2. While the Court of Claims placed its decision on the ground that there was no evidence of intention to reserve to the Creek Nation title to the river beds, it said that it did "not mean to indicate that if there had been such an intention the * * * [petitioner] would be entitled to recover"

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[2] This finding is in accord with the conclusion reached by the Eighth Circuit in the *Hayes* case, 20 F. 2d at 888. However, petitioner contends (Pet. 16–18) that the Court of Claims erred in failing to find that the river beds had a known value at the time the allotments were made. Petitioner relies solely upon a statement by an engineer residing in Kansas City from 1897 to 1906 that there was some oil excitement in vicinity of the Arkansas River in 1901 and 1902 (R. 49), and the statement in "And Still the Waters Run" (Angie Debo, Princeton University Press, 1940, p. 86) that oil was found in paying quantities in the Creek Nation in 1901. Clearly these fragments do not demonstrate that the court below erred in failing so to find.

(R. 18). We believe it plain that, even if petitioner were right as to the understanding of the parties, the United States would not be obligated to pay just compensation under the Fifth Amendment.

This is not an instance in which the United States, departing from the role of guardian, has treated tribal property as government property. *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110, 113. In such case, the United States assumes an obligation to make just compensation, whether it appropriates the property for itself (*United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 509–510) or for others. *United States* v. *Creek Nation,* 295 U. S. 103, 110–111; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 495; *United States* v. *Klamath Indians,* 304 U. S. 119, 123. Here there is no allegation that the United States purported to treat the land in the river beds as its own; the United States is sought to be charged with liability solely because its officers so drafted the patents that title passed to the Creek allottees and purchasers. This action plainly did not constitute a taking of the lands by the United States and accordingly the United States is not accountable to petitioner for such a taking.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions or question of

general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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